UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL ACTION NO. 2:18-CR-1094
	§	
AARON KEITH AVERY	§	

ORDER DENYING MOTION TO SUPPRESS

Before the Court is Defendant Aaron Keith Avery's (Avery) motion to suppress evidence (D.E. 15). Avery is charged by indictment (D.E. 9) with two counts of illegally transporting aliens within the United States. The Government filed a response (D.E. 17) and the Court held a hearing on the motion on January 24, 2019. For the following reasons, the motion to suppress (D.E. 15) is DENIED.

FACTS

On September 14, 2018, Border Patrol Agent Vanessa Prado (Agent Prado) was working in the primary inspection area of the border patrol checkpoint near Falfurrias, Texas. Around 4:00 p.m., Avery entered the checkpoint driving a 2018 Toyota Camry with no visible passengers. Agent Prado, who has approximately three and a half years of experience as a border patrol agent, immediately noted a bar code on the windshield indicating that Avery's car was a rental. She observed that the vehicle was clean, there was no luggage, and Avery wore nice clothing, suggesting that he came from an event.

Agent Prado asked Avery about his reason for travel and whether the vehicle belonged to him. Avery answered that he was returning to San Antonio from a funeral in the Rio Grande Valley and the vehicle was a rental. Agent Prado asked whether he had

any luggage in the trunk to which he responded that he did not. Agent Prado testified that Avery also said that he had spent only a couple of hours in the Rio Grande Valley. However, she did not include this statement in her report. As she questioned Avery, a canine handler walked by the vehicle with his dog, but there was no alert.

Agent Prado then asked if she could search the trunk of the car and Avery responded, "Yes." As he reached for the trunk lever, she observed his hands shaking. Two individuals were discovered in the trunk, who were later determined to be illegally present in the United States. The encounter lasted approximately 35 seconds.

Agent Prado never asked Avery about his immigration status. She testified that several matters raised her suspicion—the car was a rental, Avery had only been in the Rio Grande Valley a couple of hours after traveling from San Antonio which is about a five hour trip, and there was no luggage in the vehicle. She stated that individuals involved in alien smuggling normally make quick trips.

Avery now moves to suppress the fruits of the search, arguing that the stop violated his Fourth Amendment rights.

DISCUSSION

A. The Immigration Checkpoint Stop Was Not Unconstitutionally Prolonged

Avery first argues that the stop in the primary area of the immigration checkpoint was unconstitutionally prolonged, thereby requiring suppression. The Court disagrees.

The Fourth Amendment generally prohibits law enforcement from stopping motorists absent "individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). However, the Supreme Court has exempted

immigration checkpoints from this rule because of the public interest in stemming the flow of illegal immigration and the brief, nonintrusive nature of these checkpoints. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 556–58 (1976).

Ordinarily, "[t]he permissible duration of an immigration checkpoint stop is . . . the time reasonably necessary to determine the citizenship status of the persons stopped." *United States v. Machuca-Barrera*, 261 F.3d 425, 433 (5th Cir. 2001). "[T]he length of the detention, not the questions asked" determines the constitutionality of the stop. *Id.* at 432 (finding that a stop lasting "no more than a couple of minutes" was within the permissible duration). If the routine questioning generates reasonable suspicion of other criminal activity, the stop may be extended to accommodate the new justification. *Id.* at 433. This analysis "'is necessarily fact-specific, and factors which by themselves may appear innocent, may in the aggregate rise to the level of reasonable suspicion.'" *United States v. Santiago*, 310 F.3d 336, 340 (5th Cir. 2002) (quoting *United States v. Ibarra–Sanchez*, 199 F.3d 753, 759 (5th Cir. 1999)). In assessing reasonable suspicion, the Supreme Court has "said repeatedly that [courts] must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)).

Avery argues that there was no reasonable suspicion to extend the stop. And because Agent Prado failed to ask about his citizenship status, the unrelated questions impermissibly prolonged the stop.

The Fifth Circuit has repeatedly "declined to establish a set script of immigration questioning to which agents must adhere by rote, recognizing that, generally, it is the length of the detention, not the questions asked, that makes a specific stop unreasonable." *United States v. Ventura*, 447 F.3d 375, 381 (5th Cir. 2006) (citations omitted); *see also United States v. Jaime*, 473 F.3d 178, 185 (5th Cir. 2006). ("[U]nder *Machuca-Barrera* it is necessarily irrelevant whether a non-immigration question comes before, rather than immediately following, the completion of the immigration questions and answers, for in either event the duration of the stop is equally extended, and, if the non-immigration question and answer are asking and giving consent to search, in either event the extension of the stop's duration is permissible.").

The Court finds reasonable suspicion on the facts of this case. Additionally, the immigration stop was not unconstitutionally prolonged.

B. Avery's Consent to Search the Trunk Was Valid

Avery argues that his consent to search the trunk was not voluntarily and freely given. A warrantless search by police constitutes a violation of the Fourth Amendment and is invalid unless it falls within one of the recognized exceptions to the Constitution's warrant requirement. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). One exception is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (citing *Davis v. United States*, 328 U.S. 582, 593–94 (1946)). However, the "validity of the search turns entirely on the effectiveness of consent given for the search." *United States v. Jaras*, 86 F.3d 383, 388 (5th Cir. 1996). The consent must have been "freely and voluntarily given."

United States v. Watson, 273 F.3d 599, 604 (5th Cir. 2001) (citing *United States v. Ponce*, 8 F.3d 989, 998 (5th Cir. 1993)).

"In order to satisfy the consent exception, the government must demonstrate that there was (1) effective consent, (2) given voluntarily, (3) by a party with actual or apparent authority." *United States v. Scroggins*, 599 F.3d 433, 440 (5th Cir. 2010) (citing *United States v. Gonzales*, 121 F.3d 928, 938 (5th Cir. 1997)). The Fifth Circuit has identified six factors, no one of which is dispositive, to weigh in determining whether consent is voluntarily given:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedure; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

United States v. Tedford, 875 F.2d 446, 451–52 (5th Cir. 1989) (citing *United States v. Galberth*, 846 F.2d 983, 987 (5th Cir.1988)). The Court considers each in turn.

The voluntariness of the defendant's custodial status. The parties do not dispute that Avery was not free to leave. Although this factor weighs in Avery's favor, the Court notes that Avery had been detained for only about 30 seconds before he consented to the search.

The presence of coercive police procedure. Although Agent Prado carried a visible firearm, "the mere presence of armed officers does not render a situation coercive." *United States v. Escamilla*, 852 F.3d 474, 483 (5th Cir. 2017) (quoting *United*

States v. Martinez, 410 Fed. App'x 759, 764 (5th Cir. 2011)). There is no evidence that Agent Prado threatened or yelled at Avery or treated him rudely. *See United States v. Mata*, 517 F.3d 279, 291 (5th Cir. 2008). The absence of any coercive police activity weighs in favor of the Government.

The extent and level of the defendant's cooperation with the police. The evidence indicates that Avery fully cooperated with Agent Prado's questions. Therefore, this factor also weighs in favor of the Government.

The defendant's awareness of his right to refuse consent. There is no evidence that Avery was informed of his right to refuse consent. However, "the lack of awareness of this right does not taint the voluntariness of consent." *United States v. Lopez*, 911 F.2d 1006, 1011 (5th Cir. 1990) (citations omitted); *see also United States v. Arias-Robles*, 477 F.3d 245, 250 (5th Cir. 2007) ("[T]here is no '*Miranda* requirement' attending a simple request for permission to search."). The Government cites to Avery's criminal record, but fails to establish how prior, unrelated criminal history informed him of his right to refuse consent. This factor is neutral.

The defendant's education and intelligence. There was no evidence presented regarding Avery's education or intelligence. There is no reason to believe based on the facts that he was not of reasonable intelligence. Accordingly, this factor weighs slightly in favor of the Government.

The defendant's belief that no incriminating evidence will be found. Finally, it was certain that a search of the trunk would reveal the two aliens hiding inside. Avery could not have rationally believed otherwise. *See c.f. United States v. Olivier-Becerril*,

861 F.2d 424, 426 (5th Cir. 1988) ("[Defendant was] apparently secure in the knowledge that because the hidden compartment was below the trunk floor, and the carpet above was glued to the false top, the inspection of the trunk would disclose nothing."); *United States v. Muniz-Melchor*, 894 F.2d 1430, 1440 (5th Cir. 1990) (evidence that defendant "believed it likely nothing would be discovered" weighed in favor of finding consent to search was voluntarily given). Thus, this factor weighs in Avery's favor.

After a review of the evidence, the Court concludes that Avery freely and voluntarily consented to the search of his trunk.

CONCLUSION

For the reasons set forth above, Avery's motion to suppress (D.E. 15) is DENIED.

ORDERED this 15th day of March, 2019.

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE